UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

DNM DELIVERY SOLUTIONS, INC.[1]

Employer

and Case 20-RC-18041

CHAUFFEURS, TEAMSTERS, AND
HELPERS LOCAL UNION No. 150

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, DNM Delivery Services, Inc., has a contract with DHL Worldwide Express, Inc. (herein called DHL) to provide parcel delivery and pickup services at DHL's Fairfield, California facility. The Petitioner, Chauffeurs, Teamsters and Helpers Local Union No. 150, filed a petition with the National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent a unit comprised of all package car drivers, excluding all other employees, supervisors and guards as defined by the Act.

A hearing officer of the Board held a hearing in this matter on July 12 and 18 and August 10 and 11, 2005.[2] Testifying at the hearing were Employer President Dewey McDaniel, NICA[3] paralegal Peter Buckley, Teamster Local 490 business agent Don Garcia, and three of the

[1] The petition initially named DHL Worldwide Express, Inc. as a joint employer. Petitioner subsequently withdrew DHL from the petition.

[2] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[3] National Independent Contractors Association

approximately fifteen drivers whose employee status is at issue. Subsequently, the Petitioner filed a brief and the Employer submitted copies of various court and administrative decisions to the undersigned. The sole issue presented is whether the drivers are independent contractors, and thus are not employees as defined in Section 2(3) of the Act.[4] The Employer asserts that the drivers are independent contractors, while the Petitioner contends that they are employees entitled to the benefits and protections of the Act.

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, based upon the evidence and relevant law, I have concluded that the drivers are "employees" as defined in Section 2(3) of the Act. Accordingly, I shall direct an election in the unit described below.[5]

I. FACTS

A. Overview of the Employer's Operation.

The Employer is one of two contractors providing DHL delivery and pickup services out of DHL's Fairfield, California facility. The Employer and the other DHL contractor working out of that facility, Bonnie S. Ingram d/b/a Metro Couriers, cover two separate geographic areas.[6] In addition to its contract to provide DHL services at the Fairfield facility, the Employer performs

[4] The parties stipulated at the hearing, and I find, that the Petitioner is a labor organization within the meaning of the Act.

[5] The record establishes that the Employer, a California corporation with an office and place of business in Fairfield, California, is engaged in the business of providing parcel delivery service for DHL. The parties stipulated, and I find, that during the calendar year ending December 31, 2004, the Employer provided services valued in excess of $50,000 within the State of California directly to DHL and that DHL is directly engaged in interstate commerce. Based on such evidence and the parties' stipulation, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this matter.

[6] The Petitioner has filed a petition to represent Metro's drivers in Case 20-RC-18042. The parties in that case also disagree as to whether Metro's drivers are "employees" or "independent contractors" and a separate hearing was held in that matter.

similar services at DHL stations in Mather and North Sacramento, California.[7] The Employer has no business other than the pickup and delivery services provided to DHL.

The Employer and Metro both contracted with DHL to provide service at the Fairfield facility beginning in early February 2005. Prior to that time, a single contractor, H.B. Anderson, provided all of DHL's pickup and delivery services at the Fairfield facility.

As of the time of the hearing, approximately 15 drivers performed services for the Employer at the Fairfield facility. In addition, the Employer employs a manager, Art Belser, and a dispatcher. DHL employs a station manager, Scott Rivers, at the Fairfield facility.

The Fairfield facility operates Monday through Saturday. The facility is essentially a large warehouse with a conveyor belt running down the middle. The Employer has slots for its drivers' vans on one side of the conveyor belt and Metro has slots for its drivers' vans on the other side of the belt. Packages begin to arrive around 5:30 a.m. from the airport. The conveyor belt begins running at 7:00 a.m. in the morning. Each morning, a couple of the drivers unload the packages from the airport crates and place them on the conveyor belt; the drivers refer to this work as "throwing freight." The drivers rotate the task of throwing freight. The rest of the drivers stand between their van and the conveyor belt and watch for packages that are addressed to customers on their route. As they spot packages on their route, the drivers pick the package off the belt, scan it into their scanner, and then either place it on the ground or load it in their van; the drivers refer to the process of removing packages from the belt as "picking freight." The drivers pick freight until about 8:30 a.m. After all of their packages have been retrieved from the belt, the drivers load their vans and download their scanner. The Employer does not

[7] The drivers at the Mather and North Sacramento facilities are not sought as part of the bargaining unit and they are not otherwise discussed in this case.

require the drivers to load their vans in a particular way.[8] Pursuant to its contract with DHL, the Employer randomly selects three vans to audit each morning. For security reasons and as part of the audit, Manager Belser spot checks to ensure that the drivers' packages have been scanned.[9] Drivers then leave the facility to begin their routes.

The Employer does not tell drivers the order in which they should make their deliveries or pickups. The contract between DHL and the Employer requires that deliveries be made to customers by set times (10:30 a.m., noon, 3:00 p.m., and 5:00 p.m.) depending upon the shipping priority for the packages. Drivers make pickups throughout the day. Some pickups are regularly scheduled and some are called in that day by customers. If the pickup is called in that day, DHL or the Employer's dispatcher will send a message to the driver on his scanner. When the driver is notified of a pickup, he is given a window period during which the pickup must be made. DHL establishes cut off times after which pickups will not be made. The drivers scan their deliveries and pickups as they are made to record the package's status and the time.

After the drivers' last pickups, they return to the Fairfield facility to unload their packages. Drivers are told to return to the facility by 4:30 p.m. so that their packages can be loaded onto either the 4:30 p.m. DHL truck or on the 4:45 p.m. chase truck, both of which go to the Sacramento Airport. If a driver misses both those trucks, he must make arrangements to get the packages to the Airport -- either by driving himself, finding another driver (or manager or dispatcher) to take them, or by hiring a courier.

[8] Either DHL or the Employer has suggested certain methods of loading the vans.

[9] DHL also occasionally audits vans to make sure that drivers are carrying required DHL supplies.

At the end of the day, the drivers unload their pickups at the Fairfield facility, sign in to show that they have arrived at the station, scan any packages that were undeliverable, place their scanners in a cradle to download data to DHL's database, and fill out the paperwork associated with the deliveries and pickups made that day.

The same routine occurs on Saturdays, but because the load is much lighter, only two drivers are required to work and it usually only takes about half a day to make the deliveries and pickups. Saturday work is rotated among the drivers pursuant to a list posted by Manager Belser. The Employer pays the Saturday drivers a flat rate of $100.

B. Indicia of Independent Contractor Status versus Employee Status

1. Hiring the Drivers. At the time of the hearing, approximately fifteen drivers worked for the Employer, including Mike Navarec, Ricky Reese and Drew Avila, who each testified at the hearing. Most of the drivers, including Navarec, Reese and Avila, previously performed services for H.B. Anderson and were retained by the Employer when it assumed the DHL contract. The drivers kept the same routes that they drove for Anderson.

Employer President McDaniel testified that after he was awarded the DHL contract at Fairfield, he talked to each of H.B. Anderson's drivers (presumably, those who had routes in the geographic area awarded to the Employer) and asked if they wanted to stay on and drive for the Employer. McDaniel asked each of the drivers to bring check stubs that would reflect what they earned while driving for H.B. Anderson. H.B. Anderson paid drivers on a piece rate. McDaniel testified that he used the figures from those check stubs to calculate an average daily rate for each route and then he offered that average rate to the driver. The record does not reflect that the drivers negotiated much over the rate. The drivers' daily rates vary slightly in $5 increments between $200/day and $220/day. McDaniel then wrote the daily rates into a document titled

"Independent Contractor Agreement" (IC Agreement) and presented that document to each driver. Every driver signed an IC Agreement without making any changes to the document.

2. The Independent Contractor Agreement.

The fourteen IC Agreements in the record are identical, with the exception of the daily rate paid to the driver. As discussed below, the Employer and drivers' practice differs in many ways from the provisions of the IC Agreement. In addition, in some circumstances, the IC Agreement is silent on a matter that is clearly established by the parties' practice (for example, although not set forth in the IC Agreement, the drivers must wear DHL uniforms and their vans must meet specific make and model requirements and be painted in DHL colors with DHL's logo or mark).

Each IC Agreement has a number of clauses stating that the relationship between the Employer and the driver is an independent contractor relationship.[10] Each IC Agreement is

[10] All of the Agreements contain the following language under the heading entitled "Services Covered":

> In pursuing the work described in this Contract, the Contractor understands and agrees that he/she shall be and remain an Independent Contractor in fact and law. The Contractor shall be responsible for the manner and means of securing the end result of the purpose of this contract and shall use his/her own independent judgment and discretion for the most effective and safe manner in conducting delivery services. DNM Delivery Solutions, Inc. shall exercise no direct control over Contractor, nor the method or means employed by the Contractor in the performance of such services, including the election of routes and order of deliveries. It is the sole responsibility of the Contractor for completing each specific delivery accepted from DNM Delivery Solutions, Inc. and for any failure of performance.

In addition, each IC Agreement contains a provision titled "Independent Contractor Status":

> [The Employer] neither has nor reserved any right of power to exercise any direction, control or determination over the manner, means or methods of the [driver's] activities and objectives in operating his/her business. [The driver] agrees not to hold himself/herself out as an employee or partner of [the Employer] or as having authority to represent [the Employer], but only as an independent delivery [driver] to [the Employer] for the purpose of performing this Contract. [The driver] has no power or authority to incur any debt, obligation or liability on behalf of [the Employer].

effective for an indefinite period.[11] Each IC Agreement has a clause stating that the driver will provide a vehicle for the performance of their delivery services and that the driver will be responsible for all operation costs and expenses including fuel, repairs, insurance, maps, hand truck, rope and other supplies.[12] Each IC Agreement contains a provision requiring the driver to carry a specified amount of liability insurance coverage, and a clause stating that the driver will hold the Employer harmless for any loss or damage, including attorneys' fees, incurred as a result of the driver's actions arising from the performance of their services under the contract. In addition to the foregoing, the IC Agreement expressly prohibits the drivers from assigning their rights and duties under the Agreements.

Under the IC Agreement, the driver agrees to deliver all DHL shipments by certain specified times. The specified delivery times coincide with the Employer's service commitments to DHL. If a driver is responsible for a service failure (a missed delivery deadline), the IC Agreement provides that his compensation may be lowered. Although the IC Agreement permits the driver to reject delivery orders, the record establishes that drivers cannot exercise this right.

According to the IC Agreement, the Employer has no right or power to exercise any direction, control or determination over when the driver works and the driver is free to set his own schedule. The IC Agreement merely requires the driver to notify the Employer of his designated schedule and that schedule must avoid interruptions in customer service. In practice, however, the Employer expects drivers to be at the facility by the time the conveyor belt starts

[11] "This Contract shall be executed on a job-by-job basis and shall be self-executing effective upon acceptance of each new delivery job unless terminated by either party or default . . ." The IC Agreement states that it can be terminated without cause by either party with 7 days notice and terminated immediately for cause or material breach.

[12] As discussed below, most of the drivers rent their vans from the Employer and the rental fee covers such costs as maintenance, registration and insurance.

running at 7:00 a.m. and expects them to return with their pickups by 4:30 p.m. in order to get their pickups loaded onto the truck bound for the airport.

The IC Agreement specifies that the drivers are responsible for filing their own taxes and that the drivers will not be treated as employees for tax purposes. The IC Agreement also states that the driver understands that because he is an independent contractor, he is not eligible for any Employer pension plan, health or disability plan, or any other insurance or fringe benefit and that he understands that he is not covered by the Employer's workers' compensation insurance.

The IC Agreement specifically reserves the driver's right to be "concurrently or subsequently engaged in another delivery service business or other occupation or business." The driver is prohibited, however, from diverting delivery orders received from the Employer to a competitive delivery service. In addition, as described below, the drivers cannot use vans bearing DHL's colors and logo to make deliveries on behalf of any other company.

Finally, the IC Agreement provides that the drivers will receive their compensation from the National Independent Contractors Association, Inc. (NICA) rather than from the Employer directly.

The record establishes that the Employer required the drivers to execute the IC Agreement in order to make deliveries for the Employer. In addition, the Employer required that the drivers belong to NICA.[13] In return for a weekly fee, NICA issues to the drivers an occupational accident insurance policy that provides medical, disability, dismemberment, non-occupational and death benefits. The weekly fee also covers NICA's preparation and filing of

[13] The drivers who came from H.B. Anderson were already members of NICA. President McDaniel testified that the Employer believed that it was necessary and legal for the drivers to be members of NICA.

estimated quarterly tax payments, a tax escrow service and annual income tax preparation services.

3. The Drivers' Trucks and Equipment. As described above, the IC Agreement requires that the drivers provide a vehicle for the performance of delivery services. In reality, only three or four of the drivers own their van. The rest of the drivers rent a van from the Employer. Under the standard rental agreement used by the Employer, the drivers agree that the weekly rental fee (almost always in the amount of $167/week) will be deducted from the check issued to them by NICA. According to the rental agreement, the rental payment covers the cost of operating the vehicle including "commercial auto insurance, registration fees, applicable taxes, and fuel and maintenance fees." In fact, the drivers pay for their own fuel. According to the testimony of Driver Avila, the rental payment includes such maintenance costs as oil changes and tire changes. The rental agreement also provides that the driver is subject to monetary penalties if he does not return the vehicle "to the office daily without the written consent of [the Employer]." The evidence, however, establishes that most drivers take their vans home each evening, although the Employer's President McDaniel testified that he reserves the right to tell a driver to return a rented van to the facility if the Employer needs to use it for deliveries.

Although the IC Agreement does not address the issue, in practice there is a strict requirement that the vehicles used by the drivers to fulfill their delivery obligations must be of a certain make and model, be painted with DHL's colors, and bear DHL's logo. This practice stems from the Cartage Agreement between the Employer and DHL which incorporates DHL's Trademark Usage and Display Standards and Specifications (Trademark Usage Guidelines). Further, the Trademark Usage Guidelines require the Employer to ensure that: the drivers' vehicles are "maintained to project a professional and businesslike image through a program of

regular cleaning, painting and repair;" the vehicles display lettering to show that the vehicle is "Operated By" the Employer,[14] and, "no extraneous stickers, decals, or advertisements" be allowed on any vehicle bearing the DHL logo. Finally, the Cartage Agreement prohibits any vehicle with the DHL logo on it from being used for any purpose other than DHL deliveries.[15]

The Employer is required by the Cartage Agreement to have its drivers use DHL scanners/radios. The Employer pays a rental fee to DHL for these devices. The Employer, in turn, charges the drivers a rental fee of $14/week for their use of the scanners. The drivers use the scanners to keep track of their packages. In addition, a message will pop up on the scanner if the driver has a pickup. The scanners also allow for other communication with the Employer's dispatcher. The drivers download their scanners every evening at the Fairfield facility.

4. Drivers' Schedules and Routes. Drivers are expected to be at the facility by 7:00 a.m. when the conveyor belt begins running. Although the Employer's president testified that he never told the drivers that they had to be there at 7:00 a.m., he admitted that if they were not there at that time, they would be late in picking their freight, late in leaving the facility, and they would end up with service failures. Some drivers testified, on the other hand, that they were told by President McDaniel and Manager Belser that they needed to arrive at 7:00 a.m. Whether or not they were specifically told that they must be there at 7:00 a.m., the delivery demands established by DHL, and in turn made by the Employer on the drivers, clearly require that the drivers begin their day when the freight begins to move down the conveyor belt. This conclusion

[14] Consistent with this contract language, drivers testified that the vans contain lettering stating "Operated By DNM Delivery Solutions."

[15] The Trademark Guidelines permits the Employer "from time to time" to transport non-DHL shipments, but only if the Employer first obtains DHL's express written authorization. There is no record evidence to show that the Employer has ever sought such authorization.

is buttressed by the fact that the Employer issued a written counseling to a driver who arrived at the facility at 8:00 a.m. for three or four days in a row.

Drivers do not select their route and their route is not specified in the IC Agreement. The drivers who came from H.B. Anderson kept the routes that they drove previously. New drivers were informed that they would drive the route that was available. The record also established that the Employer can unilaterally modify a route (a right reserved to the Employer in the IC Agreement). For example, when the volume on one route increased so much that one van could no longer handle it, the Employer adjusted two of the routes to balance the volume.

With regard to Saturdays, this work is rotated among the drivers based on a schedule posted by the Employer's manager. Drivers are free to arrange for another driver to perform their Saturday work; if they do so, the Employer pays the driver who actually worked.

5. Vacations, Time Off and Replacement Arrangements

Employer President McDaniel testified that if a driver misses a day of work, it is the driver's responsibility to cover his route. According to McDaniel, the route gets covered in one of thee ways: a driver may arrange to have one of his co-drivers cover the route; Manager Belser may elect to cover the route; or a courier service covers the route. If Manager Belser covers the route, then he receives additional pay directly from the Employer. If a co-driver or courier covers the route, then the driver is responsible for paying them. Despite President McDaniel's testimony that he believed that most missed days of work were covered by a courier service, there is no specific example of that happening in the record. The testimony, in general, suggests that the drivers avoid the use of a courier service because it is cost prohibitive. Thus, all of the specific examples in the record involve coverage by either Manager Belser or by co-drivers.

Driver Avila testified that, prior to the day of his testimony, he had never had to find a replacement driver because he had never missed a day of work. Avila testified that it was his understanding that if a driver did not show up, he could hire a courier service to cover his route, but that he had never done this. When he found out that he was going to miss a day of work because he had to testify, Avila notified his "station manager" and the manager arranged for a courier service. Avila did not know how much the courier service was going to cost him or how any of the arrangements with the courier service worked.

Driver Navarec testified that Manager Belser had told the drivers that they should give him two weeks notice if they were going to take any time off so that he could arrange coverage. According to Navarec, the two week notice requirement was written on a board at the Fairfield facility. Navarec testified that, prior to the day of the hearing, he had only taken one day off since he had been driving for the Employer. In that instance, Navarec gave Manager Belser two weeks notice that he would not be working on a particular day. Navarec testified that he believed that Belser covered his route for him. Navarec was not paid his $220 flat rate for the day he took off and he did not pay Belser to cover his route.[16] In order to testify at the hearing, Navarec again notified Belser that he would not be able to drive and Manager Belser arranged to cover the route. On the first day that Navarec attended the hearing, Belser covered Navarec's route and Navarec did not expect to pay him. On the second day, Navarec thought that Belser might use a courier service for his route and Navarec was not certain whether, or how much, it was going to cost him. According to Navarec, only one driver, Jason Bailey, routinely took time

[16] Navarec also testified that about two weeks before the hearing in this matter, Belser announced that he would no longer arrange such coverage for the drivers. The Employer's President McDaniel denied that the Employer has a policy of requiring the drivers to give two weeks notice before they take a day off, but admitted that they had been asked to give two weeks notice as a "courtesy."

off and, in those circumstances, Bailey had other drivers split his route in half and he paid each driver about $100 for the day.

According to Driver Navarec, if a driver cannot fit all of his packages on his van on a particular morning, then Manager Belser may deliver those packages himself or Belser or a DHL manager would arrange for a courier service to make the deliveries. In those circumstances, the driver does not pay for the courier service.

According to the drivers' testimony if a driver does not want to work his Saturday rotation, he can find another driver to cover for him. In that instance, the scheduled driver does not pay his replacement; rather, the Employer pays the driver who actually worked (through NICA).

There is no evidence that any of the drivers have hired a person who is not already a DNM driver to cover their route.

6. Adherence to Employer Policies. There is no evidence that the Employer maintains an employee handbook or list of employee work rules. On the other hand, the record clearly establishes that the Employer has expectations of the drivers regarding their work and that the Employer takes actions to ensure that the drivers meet those expectations. The expectations include: that the drivers routinely arrive in time to pick freight at 7:00 a.m.; that the drivers will rotate responsibility for throwing freight; that drivers make their deliveries and pickups by specified times; that the drivers' vans be kept clean and orderly; that drivers wear a DHL uniform and are properly groomed; that the drivers carry a badge with the DHL logo, but identifying them as a driver for DNM Delivery Solutions; that the drivers' maintain certain DHL supplies in their van; and, that all packages be scanned. The Employer has ensured that these expectations are met by counseling a driver who was habitually late, by posting a report of

service failures, by directing drivers to throw freight, by auditing the drivers' vans and their personal appearance; and by maintaining the right to impose monetary penalties on drivers who have service failures.

7. Sources of Drivers' Income. The record reflects that drivers have little opportunity to earn income beyond the daily flat rate paid by the Employer.[17] There is no evidence that the drivers solicit additional business for DHL. Even if they did bring in additional DHL customers, this would not increase the drivers' compensation because they are paid a flat rate for their route – it does not matter how many packages they pickup or deliver. Drivers do not determine the price to be charged for pickup or delivery services, they do not determine what pickup and delivery services are offered to DHL's customers, nor do they take orders for pickups or deliveries, and they do not collect payments from DHL customers.

There is no evidence that the drivers make deliveries or pickups for any company other than for DHL through the Employer. In addition, the Cartage Agreement between the Employer and DHL specifically prohibits the use of any of the DHL-painted vans to make deliveries for a company other than DHL. There is no evidence that any of the drivers own or operate more than one van. Moreover, there is no evidence that the drivers hire helpers or drivers from outside the Employer to work for them. In sum, there is no evidence that the drivers receive substantial income from any source other than the Employer.[18]

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[17] The Employer does not provide the drivers with any holidays, paid vacation, sick leave or any other fringe benefits.

[18] There is some testimony that Metro, the other DHL contractor at Fairfield, hires a couple of the Employer's drivers to perform the "p.m. sort." The p.m. sort involves sorting the pickups by routing codes into the proper cans to be shipped out. It does not involve parcel delivery services. I find this to be more akin to a driver holding another job (i.e., moonlighting), rather than evidence that the drivers have any entrepreneurial opportunity.

8. Training, Prior Experience, and Skill. The record reflects that little experience is required to be a delivery driver. The only training new drivers receive from the Employer is to ride along with another driver or with Manager Belser in order to learn a route, learn how to use the scanner, and learn how to fill out required paperwork. Other than on-the-job training, there has been minimal training on such subjects as transporting hazardous materials and using safe lifting techniques. The drivers are not required to have a commercial driver's license; a regular driver's license is all that is required to drive the vans used by the Employer.

9. Business Status of Drivers. Based on the record evidence, about nine of the drivers have fictitious business names and appear to operate as business entities for tax and insurance purposes. The record does not reflect whether the drivers deduct business expenses such as fuel, repairs, and lease payments, from their taxes.

10. Personnel Files & Evaluations. There is no evidence that the Employer prepares evaluations for the drivers or maintains personnel files on them.

II. ANALYSIS

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." The Board determines whether an individual is an employee or an independent contractor by applying the common law agency test. *Argix Direct, Inc*., 343 NLRB No. 108 slip op at 4 (December 16, 2004); *Roadway Package System, Inc.*, 326 NLRB 842, 849-850 (1998). See also, *Dial-A-Mattress Operating Corp*., 326 NLRB 884 (1998). In *Roadway*, the Board rejected the argument that the predominant factor in this analysis is whether an employer has a "right to control" the manner and means of the work performed by the individual whose status is at issue. The Board cautioned that the right to

control factors listed in the *Restatement (Second) of Agency* are not exclusive or exhaustive, and that, in applying the common-law agency test, it will consider "all the incidents of the individual's relationship to the employing entity." *Roadway, supra* at 850; see also, *Dial-A-Mattress, supra* at 892. The Board recently reaffirmed the analysis used in *Roadway* and *Dial-A-Mattress*. *St. Joseph New-Press*, 345 NLRB No. 31 (August 27, 2005), slip op. at 5.[19]

As set forth in *Pan American Grain Co., Inc*., 343 NLRB No. 47 slip op. (October 26, 2004), with regard to determinations involving employee versus independent contractor status:

> Among the many factors that the Board has considered in making this determination in the cases of truck drivers/owners are whether the individuals: perform functions that are an essential part of the company's normal operations; receive training from the company; do business in the company's name with assistance and guidance from it; are prevented from engaging in outside business; provide services under the company's substantial control; have substantial proprietary interests beyond their investment in their trucks; lack significant entrepreneurial opportunity for gain or loss; leave their vehicles overnight with the company; are subject to discipline by the company, *Id.* at 851-852; have control and responsibility for their own employees; select and acquire their vehicles; are responsible for the financing, inspection, or maintenance of the vehicles without involvement by the company; are guaranteed minimum compensation by the company; are required by the company to provide delivery services each scheduled workday, *Dial-A-Mattress Operating Corp.*, 326 NLRB at 891-892; make their own arrangements for the parking and storage of the trucks when not in use; are free to decide whether to make their trucks available to the company on a particular day, *Portage Transfer Co.*, 204 NLRB 787, 787-789 (1973); receive direction from the company regarding the route to be used to a delivery point; are issued identification cards by the company; *National Freight, Inc*., 146 NLRB 144, 146 (1964); operate trucks bearing the company's name; control the means by which he or she achieves the company's ends; *Deaton Truck Lines, Inc*., 143 NLRB 1372, 1376-1378 (1963), affd. 337 F.2d 697 (5th Cir. 1964), cert. denied 381 U.S. 903 (1965); and have social security or other taxes withheld from their paychecks by the company; *Bowman Transportation, Inc.*, 142 NLRB 1093, 1096 (1963).

[19] The Employer supplied copies of a number of decisions by state judicial and administrative agencies analyzing whether certain individuals were independent contractors. Because there is a substantial body of Board law regarding this issue, I do not find it necessary to discuss those state and administrative decisions.

Finally, the burden is on the party asserting independent contractor status to show that the individuals in question are independent contractors. *Argix Direct, Inc*., *supra*; *BKN, Inc*., 333 NLRB 143, 144 (2001).

Applying these factors to the instant case, I find that the Employer's drivers are employees within the meaning of Section 2(3) of the Act and not independent contractors. Although, as in most cases involving independent contractors, there is some evidence that supports a contrary conclusion, I find that the balance in this case weighs heavily in favor of a finding of employee status.

Thus, it is plain that the drivers perform functions that are an essential or "core" part of the Employer's normal operations. See *Roadway Express*, *supra*; *Slay Transportation Company, Inc*., 331 NLRB 1292 (2000). The Employer's business is to deliver and pickup packages for DHL under an exclusive contract with DHL for that geographic area. The Employer has no other business. Without the drivers, the Employer would be unable to perform its basic business function. In sum, unlike the situations in *Pan American Grain Co., Inc*., and *Dial-A-Mattress*, where the employers were engaged in businesses involving the manufacture, processing and sale of a product, here the Employer's sole business is the work of the drivers, which is making pickups and deliveries for DHL. In this regard, this case is similar to *Roadway Express*, in which the drivers at issue were found to be employees rather than independent contractors, based in part on a finding that they performed an essential part of the company's business, which was delivering small packages. See also *Slay Transportation*, 331 NLRB at 1294.

The record reflects that the drivers do not need any particular training or experience prior to working for the Employer. The Employer provides brief on-the-job training to teach new drivers their route, how to use a scanner and how to fill out paperwork. In addition, the drivers

are not required to have a special drivers' license of any kind. In this regard, the instant case is quite similar to *Roadway,* 326 NLRB at 851, where the drivers were not required to have any experience and gained assistance from Roadway's personnel in orienting them to the job. In sum, there is no evidence that the drivers are required to possess a level of specialized skill or that the type of work performed by the drivers is normally performed by a specialist.

Further, the record shows that the drivers must drive a certain model and make of vehicle and that the vehicle must be painted to DHL's specifications. In addition, the Cartage Agreement between the Employer and DHL requires that the vans have the words "Operated By" and the Employer's name on the sides. This evidence is similar to the situation in *Roadway,* where drivers were required to do business in the name of the employer and operated vehicles carrying the employer's logo. See also *Slay, supra.* This factor also serves to distinguish the instant case from *Pan American*, where the drivers were found to be independent contractors, based in part on a finding that their vehicles did not carry the employer's logo.

The evidence establishes that the drivers in the instant case exercise no entrepreneurial control. Thus, the Employer pays the drivers a flat daily rate and there is no evidence that the drivers make deliveries or drive for anyone other than the Employer. There is no evidence that the drivers utilize multiple vans or cover multiple routes. The drivers almost always perform the work themselves and they do not have their own employees. See also *Slay, supra.* These factors serve to distinguish this case from *Argix Direct, Inc*., *Dial-A-Mattress Operating Corp*. and *Pan American*, where the drivers found to be independent contractors owned multiple vehicles and regularly hired helpers and other drivers to perform their work and the drivers were not guaranteed an income. This case is also distinguishable from the facts of *St. Joseph News-Press* where the Board noted that the carriers were permitted to deliver other product, including

competing newspapers, while driving for the respondent newspaper and where the carriers could solicit new customers, thereby increasing their compensation. In the instant case, the Employer is prohibited from permitting the vans to be used for anything other than the delivery of DHL packages and there is no evidence that the drivers act contrary to this prohibition. There is also no monetary or other incentive for the drivers to solicit new DHL customers. Indeed, the express prohibition contained in the Cartage Agreement between the Employer and DHL makes the instant case an even stronger fact pattern for a finding of employee status than that presented in *Roadway*, where the drivers at issue had a contractual right to use their trucks for outside business activity but were hampered from doing so by practical constraints created by their employer.

With further regard to the drivers' investment and entrepreneurial opportunity, while I recognize that many of the drivers have obtained fictitious business names and that the Employer does not make tax and social security deductions for them, I do not find these factors to be controlling or to establish evidence of significant entrepreneurial opportunity under the circumstances presented in this case. As the Seventh Circuit noted in *J. Huizinga Cartage Co., Inc. v NLRB*, 941 F.2d 616, 620 (7th Cir 1991) enforcing 298 NLRB 965 (1990), if independent contractor status could be conferred merely through the absence of payroll deductions, "there would be few employees falling under the protection of the Act." Given the substantial control the Employer exercises over the drivers as described herein, the Board's observation in *Standard Oil* Co., 230 NLRB 967, 972 (1977), is equally applicable here: "[I]t is clear that, unlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound business practices, and to be able to take financial risks in order to increase their profits." See also *Roadway,* 326 NLRB at 852. Thus,

the evidence discloses that the Employer's drivers have no substantial proprietary interest in the Employer's business. Further, the drivers' incomes are virtually 100% derived from the work they perform for the Employer.[20] Thus, the Employer essentially controls the drivers' pay rates and provides drivers with a certain level of job and income security. Thus, like the zone core settlement structure in *Roadway*, the Employer's system minimizes the entrepreneurial risks faced by the drivers.

Overall, it appears that the drivers' individual entrepreneurial opportunities are quite limited by the provisions contained in their Agreements and by the practical limitations presented by working for the Employer.

Further, the record establishes that the Employer exercises a great degree of control over the drivers' work assignments, work schedules, the tools for carrying out the assignments, and dress and grooming requirements.

With regard to work assignments, the drivers have no say in which route they drive. Though many of the drivers continued driving the same route that they did for the previous contractor, H.B. Anderson, new drivers are assigned to the route that is available. There is no evidence that drivers bid on new routes or can change their existing routes. The Employer, on the other hand, can, and has, unilaterally modified an existing route. I find that the Employer's contention that the drivers are independent contractors because it does not tell them what order to make deliveries in or how to load their trucks to be illusory. Given the schedule deadline imposed by DHL and by the IC Agreements, the drivers have little room to vary from the delivery order and loading techniques that are the most efficient.

[20] In this regard, I have considered the Employer's evidence regarding the fact that a couple of drivers perform p.m. sort work for Metro. However, the work they perform does not involve parcel delivery service and I do not consider it to constitute significant outside employment.

Also with regard to work assignments, the Employer posts a rotation for drivers to perform Saturday work and has instructed drivers that it is their turn to throw freight. In addition, the Employer admits that drivers cannot refuse to make a delivery or a pickup.

With regard to work schedules, the record evidence establishes that drivers are expected to be at the Fairfield facility at 7:00 a.m. when the conveyor belt starts running. While a driver may be a few minutes late, it is clear from the client service requirements that a driver cannot be consistently or grossly late. This conclusion is supported by the Employer's counseling of a driver who arrived around 8:00 a.m. for about three days in a row.

With regard to the Employer's control of the tools used by the drivers, the Employer requires that the drivers use certain models and makes of vehicle and that it be painted with DHL's colors and logo. Once the van meets those specifications, the driver can no longer use it for any other business. In addition, the Employer requires that the drivers carry certain DHL supplies in their vans at all times.[21] Thus, the Employer imposes control over the appearance and use of the drivers' vans. In contrast, the drivers in *St. Joseph News-Press*, *Dial-A-Mattress*, and *Argix*, did not have to meet any requirements as to the make, model, color or design of their vehicles. Moreover, because most of the drivers at issue rent their vans from the Employer, the Employer retains control in another way. Namely, the Employer has created a system, similar to that created in *Roadway*, which makes "the necessary, custom vehicles readily available to prospective drivers, and enables drivers who want to end their relationship with it to easily transfer their vehicles to incoming drivers." *Roadway*, 326 NLRB at 852. Further, while the Employer gives the drivers the option of taking the vans home or parking them at the Fairfield

[21] There is no evidence that the drivers have to purchase these supplies.

facility,[22] McDaniel testified that if a driver takes a rented van home, the Employer reserves the right to require him to bring it back in if the Employer needs it. If the driver does not return the vehicle, McDaniel testified that he would rent another van and pass the cost along to the driver who failed to return the van.

Finally, I note that the rental fee charged by the Employer to the drivers covers maintenance costs and registration fees. The Employer also supplies, and requires the use of DHL uniforms, DHL scanners, and DHL supplies and provides drivers the use of the DHL facility. Thus, the instant case differs from *Argix* and *St. Joseph News-Press* where the drivers were solely responsible for obtaining and maintaining their vehicles. The case also differs from *St. Joseph News-Press* and *Dial-A-Mattress* where the drivers were not required to wear a uniform and were not required to be clean shaven. The case is more like *Roadway* where the employer provided the drivers with the scanners and uniforms needed to complete their route.

Another factor in determining whether an individual is an independent contractor is whether he is engaged in a distinct occupation or business. In *Argix*, the drivers clearly operated their own distinct businesses. Specifically, a majority of the drivers placed their own names, addresses and/or logos on their delivery vehicles. Similarly, in *Dial-A-Mattress*, many of the drivers maintained their own business certificates with the state, organized as corporations, maintained business checking accounts, had their own company uniforms, filed corporate tax returns, maintained workers' compensation for their employees and had business tax identification numbers.

[22] I note that there is no evidence that the Employer charges the drivers a fee to park their vans at its facility.

In this case, although many of the drivers have fictitious business names, there is very little evidence that they engage in their own business. Thus, all the drivers wear DHL uniforms, carry badges with the DHL logo, and drive vans with DHL colors and logo. They work out of the DHL warehouse, use scanners supplied by DHL, and perform pickup and delivery services Monday through Saturday for DHL customers. There is no evidence that any of the drivers conduct their own delivery businesses (i.e., there is no evidence that they deliver for other companies, that they own multiple vehicles, that they collect money from customers or extend credit to customers or that they employ other individuals).

The Employer's control over the driver's terms and conditions of employment is further demonstrated by the Employer's expectations that the drivers will extend the "courtesy" of two weeks notice before taking time off. The record establishes that, up until two weeks before the hearing in this matter, the Employer's manager used that two-week notice to make arrangements to cover a driver's route for him. In this regard, the record is devoid of any specific evidence to show that drivers contacted courier companies on their own to cover their routes and there is no evidence that an individual other than a current driver or Manager Belser has covered the routes.

The term of the IC Agreements also support the conclusion that the drivers are employees rather than independent contractors. Thus, each of the IC Agreements is for an open-ended, indefinite period.

Moreover, while the IC Agreements may provide that the parties are creating an independent contractor relationship, and the tax and benefit systems are structured as such, this factor has also been present in numerous other cases in which the Board has found drivers to be employees and is clearly not a determinative factor. See e.g., *Time Auto Transportation*, 338 NLRB No. 75 (2003); *Corporate Express Delivery Systems*, 332 NLRB 1522, 1524 (2000),

enf'd 292 F.3d 777 (D.C. Cir. 2002); *Slay*, 331 NLRB at 1293; *Roadway*, 326 NLRB at 848; *Elite Limousine Plus*, 324 NLRB 992, 994 (1997).

Upon careful consideration of all the evidence in light of the above factors, I find that the Employer has failed to meet its burden of establishing that the drivers are independent contractors and I conclude, instead, that they are employees as defined by the Act. In reaching this conclusion, I primarily rely on the following factors: the drivers perform an essential part of the Employer's operation; the lack of required prior experience or particular skill level of the drivers; the Employer's assistance to the drivers with regard to renting vans to them and providing them with DHL uniforms, scanners and supplies; the fact that the vans must be painted in DHL colors and with DHL's logo; the fact that the vans state that the are "Operated By" the Employer; the fact that the drivers are paid a flat rate and that there is no room for entrepreneurial opportunity; the fact that the drivers do not control their work schedules or their routes; the open-ended term of the IC Agreements; and the fact that 100% of the drivers' income is derived from the Employer.

In concluding that the drivers are employees, I find that this case has many more factors in common with *Roadway*, as discussed above, than *Dial-A-Mattress*. Thus, I find, as the Board found in *Roadway Package System*, 326 NLRB at 851, that the Employer's drivers do not operate independent businesses but, rather, perform functions that are an essential part of the Employer's normal operations; they need not have prior training or experience, but receive assistance in this regard from the Employer; they do business in the Employer's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the Employer's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no

significant entrepreneurial opportunity for gain or loss. All of these factors weigh heavily in favor of my finding of employee status, as they did in the Board's finding of employee status in *Roadway.*

In contrast, the drivers in *Dial-A-Mattress* did not perform a core function of the employer's business and many of the drivers in *Dial-A-Mattress* owned multiple trucks and had their own employees. The drivers in the instant case, on the other hand, rent or own one truck, have no employees, and drive exclusively for the Employer.

In addition, in reaching my decision that the drivers in this case are employees, I have carefully considered the Board's decision in *Argix Direct, Inc*., in which it found the drivers at issue to be independent contractors, and I find that *Argix* is distinguishable from the facts in this case. Thus, in contrast to the instant case, in *Argix,* there were no restrictions on the drivers' use of their trucks for purposes other than delivering for the Employer, and in fact, two drivers in *Argix* withheld services from the employer in order to drive for other companies one day each week. Such evidence contrasts with the instant case where the drivers are forbidden from using their DHL-painted vans to deliver packages for another company and there is no evidence regarding their having performed work for companies other than the Employer. Second, the drivers in *Argix* were allowed to own multiple trucks and hire drivers and helpers and they did so, whereas there is no evidence in the instant case that the drivers have done so. Third, in *Argix,* the employer did not provide the drivers with any financial assistance in buying their trucks or paying their expenses, whereas in the instant case the Employer has arranged to rent trucks to most of the drivers. Fourth, in *Argix*; the drivers' vehicles were not modified specifically to suit the needs of the employer's business, as has been done in this case. Given such distinctions, I do not find that *Argix* requires a finding that the drivers are independent contractors in this case.

Finally, I find that this case is distinguishable from *St. Joseph News-Press*, in which the Board found newspaper delivery drivers to be independent contractors. The drivers in *St. Joseph News-Press* were not required to use specific vehicles and were not required to display the newspaper's logo on their vehicle. The drivers maintained their own vehicles and were not reimbursed for maintenance or operating costs. The drivers could use their vehicles for other purposes and they could deliver other products including competing newspapers while they were delivering the employer's product. The *St. Joseph News-Press* drivers did not wear uniforms, could refuse to deliver to customers, could solicit new customers and benefited economically from having new customers, could hire full-time substitutes and could hold contracts on multiple routes. The drivers had little daily contact with the management at the newspaper because they worked very different hours. Finally, the Board noted that the parties in *St. Joseph News-Press* intended to create an independent contractor relationship. Other than language in the IC Agreements in this case that indicates that the parties intended to create an independent contractor relationship, none of the other *St. Joseph News-Press* factors exist.

In conclusion, considering the degree of control exercised by the Employer and weighing all the factors discussed above, I find that the drivers are employees under the Act.

Accordingly, I decline to dismiss the petition based on the contention that the drivers are independent contractors and I find that they are employees within the meaning of Section 2(3) of the Act.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The parties do not dispute the appropriateness of the petitioned-for unit. The drivers share a substantial community of interest, since they all work for the Employer out of the same location, perform the same work, under the same supervision and management, and are under the same pay rate system. Accordingly, the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time package car drivers employed by the Employer at its Fairfield, California facility; excluding office clericals, managerial employees, guards and supervisors within the meaning of the Act.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit*(s)* who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained

their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION No. 150.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB. Wyman-Gordan Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite

400, San Francisco, California 94103, on or before October 28, 2005. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by November 4, 2005.[23]

Dated at San Francisco, California, this 21st day of October, 2005.

/s/ *Joseph P. Norelli*
Joseph P. Norelli, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735

[23] In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.